

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK LEE PALMER,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 242161

Washtenaw Circuit Court

LC No. 01-000718-FH

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his sentences of fifteen to twenty-five years; nine to twenty-five years; and nine years, nine months to fifteen years for his convictions of assault with intent to cause great bodily harm less than murder, MCL 750.84, prisoner in possession of a weapon, MCL 800.283(4), and assault of a prison employee, MCL 750.197c(1), respectively, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions resulted from a melee in the medical ward of the facility in which he was incarcerated. Several prisoners and employees were involved in the altercation. Defendant struck a civilian employee with a metal bar and bit a corrections officer who attempted to restrain him.

Defendant faced sentencing as a fourth habitual offender. MCL 769.12. The statutory sentencing guidelines recommended minimum sentence ranges of thirty-eight to 152 months for assault with intent to do great bodily harm less than murder, twenty-two to seventy-six months for prisoner in possession of a weapon, and fourteen to fifty-eight months for assault of a prison employee. The trial court found that (1) defendant's institutional record, which consisted of eighty misconduct citations including eight for threatening behavior toward corrections employees; (2) the fact that defendant willingly participated in violence directed toward unarmed employees; and (3) the fact that defendant lied to authorities about his involvement in the incident constituted substantial and compelling reasons existed to depart from the guidelines.

In most instances a trial court must impose a sentence within the calculated guidelines range. MCL 769.34(2). A trial court may depart from the guidelines if it finds that a substantial and compelling reason exists to do so. To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly

hold the attention of the court. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000) (*Babcock I*). To be objective and verifiable, a reason must be external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review the determination of the existence of a substantial and compelling reason for departure for clear error, the determination that the reason is objective and verifiable as a matter of law, and the determination that the reason constituted a substantial and compelling reason to depart from the guidelines for an abuse of discretion. *Babcock I*, *supra*, 75-76, modified by 469 Mich 247; 666 NW2d 231 (2003) (*Babcock III*). The extent of a departure from the guidelines is reviewable pursuant to the principle of proportionality set out in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Babcock*, 250 Mich App 463, 468-469; 648 NW2d 221 (2002) (*Babcock II*), rev'd on other grounds by *Babcock III*. The key test of the proportionality of a sentence is whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). The trial court may depart from the guidelines for nondiscriminatory reasons where legitimate factors either were not considered by the guidelines, or were considered but were given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

We affirm defendant's sentences. Offense Variable (OV) 1 (MCL 777.31, aggravated use of a weapon), OV 2 (MCL 777.32, lethal potential of weapon possessed), OV 3 (MCL 777.33, physical injury to victim), OV 4 (MCL 777.34, psychological injury to victim), OV 9 (MCL 777.39, number of victims), and OV 19 (MCL 777.49, security threat to penal institution) accounted for the facts that defendant used a weapon and inflicted serious injuries on multiple victims under circumstances that threatened the security of the institution in which he was confined. Moreover, Prior Record Variable 6 (MCL 777.56, relationship to criminal justice system) accounted for the fact that defendant was a state prisoner at the time of the incident. However, the trial court correctly noted that the guidelines did not account for the fact that defendant had accumulated eighty misconduct violations while incarcerated, eight of which were for threatening behavior toward corrections employees. Defendant's institutional behavior record was objective and verifiable, *Abramski*, *supra*, and was an appropriate factor to consider when determining whether a departure was appropriate. See, e.g., *People v Shinholster*, 196 Mich App 531, 535; 493 NW2d 502 (1992). Furthermore, the trial court correctly noted that the fact that defendant deliberately attacked unarmed employees as part of a planned uprising was not taken into account by the guidelines. The trial court did not err in finding that this fact was objective and verifiable, *Abramski*, *supra*, or that it was given inadequate weight by the guidelines. *Armstrong*, *supra*. The trial court's finding that defendant's attack was "vicious" was supported by the evidence that defendant struck one employee with a metal bar and bit another employee who attempted to restrain him. The trial court also properly considered that defendant had lied to investigators about his involvement in the incident. The trial court did not abuse its discretion by finding that substantial and compelling reasons existed for departing upward from the guidelines, *Babcock I*, *supra*; *Babcock III*, *supra*, and adequately articulated its reasons for exceeding the guidelines. Defendant's sentences adequately reflect the seriousness of the matter, and thus are proportionate. *Houston*, *supra*; *Babcock III*, *supra*.

Affirmed.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter